UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2989

ROBERT C. GRIGGS and
JACQUELINE M. GRIGGS

v.

PROVIDENT CONSUMER DISCOUNT COMPANY,
Appellant

(D.C. Civil No. 80-01930)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: May 13, 1982

Before: GIBBONS and HUNTER, *Circuit Judges*
and GERRY, *District Judge**

(Opinion Filed: June 2, 1982)

SHELDON C. JELIN, ESQ. (Argued)
1518 Lewis Tower Building
Philadelphia, PA 19102
Attorney for Appellant

HENRY J. SOMMER, ESQ. (Argued)
COMMUNITY LEGAL SERVICES, INC.
LAW CENTER NORTHEAST
3156 Kensington Avenue
Philadelphia, PA 19134
Attorney for Appellees

---

*Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

The Provident Consumer Discount Company (Provident) appeals from a final order of the district court assessing statutory damages against it for violating the Truth in Lending Act (the Act), 15 U.S.C. §1601 *et seq.*, and Regulation Z of the Federal Reserve Board, 12 C.F.R. §226.1 *et seq.* We hold that the district court erred in holding that a disclosure statement violated the Act and the Regulation. Thus we reverse and remand for consideration of other contentions.

I.

In June 1979, Robert and Jacqueline Griggs (Griggses) obtained a personal loan from Provident for $2940. At that time they received from Provident a document entitled "Note, Security Agreement and Disclosure Statement" which in paragraph 17-E set forth the extent and nature of Provident's security interests in plaintiffs' real and personal property. Soon thereafter, plaintiffs filed a Petition in Bankruptcy. After being discharged from their obligations, they instituted this action, alleging that Provident violated the Act and Regulation Z in three respects. They contended (1) that the description of Provident's security interest taken in after-acquired property is inaccurate and misleading; (2) that Provident improperly calculated the refund of prepaid interest due on an earlier loan refinanced by the present loan, and (3) that the inclusion in the disclosure statement of a non-existent security interest in insurance proceeds was improper. Provident counterclaimed for a setoff against any recovery of the Griggses' pre-bankruptcy obligations to it. The district court dis-

missed Provident's counterclaim, and granted summary judgment to the Griggses.[1] The court held that Provident's disclosure of its security interests in after-acquired property was inaccurate and misleading to potential borrowers. The remaining contentions were not reached since one violation of the Act is sufficient to establish liability for statutory damages. Having determined liability, the court awarded the Griggses separate recoveries of $1000.00 each under 15 U.S.C. §1640(a). Provident filed a Notice of Appeal from the order on January 16, 1981.[2] We dismissed that appeal because the district court's order was not appealable under Fed. R. Civ. P. 54. Subsequently, the district court directed the entry of a separate final judgment under Rule 54(b). On November 17, 1981 defendant filed in the district court a Motion for Reconsideration and Motion to Alter, Amend and Vacate Judgment. On November 19, 1981, a Notice of Appeal was filed. On November 23, 1981, the district court dismissed Provident's motions.

---

1. The district court opinion is reported. 503 F. Supp. 246 (E.D. Pa. 1980).

2. The Griggses urge that this matter is not appealable because Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that "[a] notice of appeal filed before the disposition of any of the above motions shall have no effect." Appellant did fail to satisfy Rule 4(a)(4) but though a premature notice of appeal is subject to dismissal, we have generally allowed appellant to proceed unless the appellee can show prejudice resulting from the premature filing of the notice. Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 882 n.2 (3d Cir.), *cert. denied*, 101 S. Ct. 390 (1981); Hodge v. Hodge, 507 F.2d 87, 89 (3d Cir. 1975); *accord* Williams v. Town of Okeboji, 599 F.2d 238 (8th Cir. 1979). *See also* 9 Moore's Federal Practice ¶204.14 (2d ed. 1982). In our case, the Griggses have shown no prejudice by the premature filing of a notice of appeal.

II.

Section 1601 of the Act sets forth the congressional purpose for enacting the Truth in Lending Act:

> The Congress finds that economic stability would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

15 U.S.C. §1601 (1976). The Act was passed to prevent the unsophisticated consumer from being misled as to the total cost of financing. *See Mourning v. Family Publications Services, Inc.*, 411 U.S. 356, 363-69 (1973). It mandates the disclosure of certain information in financing agreements and enforces that mandate by "a system of strict liability in favor of consumers who have secured financing when [the] standard[s] [are] not met." *Thomka v. A.Z. Chevrolet*, 619 F.2d 246, 248 (3d Cir. 1980); 15 U.S.C. §1640(a). *See also Ives v. W.T. Grant Co.*, 522 F.2d 791 (2d Cir. 1975). A plaintiff thus does not need to show that he was in fact deceived by substandard disclosures. *See Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538, 539 (3d Cir. 1979) (*per curiam*). Moreover, since the Act provides for statutory damages in addition to actual damages, a plaintiff need not even show actual harm.

The Act obligates "[e]ach creditor . . . [to] disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under [the

Act]." 15 U.S.C. §1631. Part of that information is "[a] description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." 15 U.S.C. §1639(a)(8). No liability can result, however, from "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the [Federal Reserve] Board." 15 U.S.C. §1640(b).

The Federal Reserve Board has issued Regulation Z, 12 C.F.R. §226.1 *et seq.*, pursuant to its rulemaking powers conferred in Section 1604 of the Act, 15 U.S.C. §1604 (1976). Regulation Z mandates that "[t]he disclosure [under the Act] . . . be made clearly, conspicuously, [and] in meaningful sequence." 12 C.F.R. 226.6(a), and that "additional information or explanations may be supplied with any disclosure required . . ., but none shall be stated, utilized, or placed so as to mislead or confuse the customer or lessee or contradict, obscure, or detract attention from the information required." 12 C.F.R. §226.6(c). The creditor must provide "[a] description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates. . . . If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired." 12 C.F.R. §226.8(b)(5). Special deference must be given the Board regulations since a determination of what is "meaningful disclosure" under the Act is an empirically achieved balance between incomplete disclosure and informational overload, a task to which the Board is better suited than the courts. *See Ford Motors Credit Co. v. Milhollin*, 444 U.S. 555, 568-69 (1980).

Our task is to determine whether the district court committed an error of law in applying the Act and Regulation Z.[3] Paragraph 17-E of Provident's "Note, Security Agreement and Disclosure Statement" provides:

> E. SECURITY: Until the Total of Payments and all other obligations of Borrower to Provident, direct, or contingent, joint, several or independent, now or hereafter existing, due or to become due, whether created directly or acquired by assignment or otherwise, have been paid in full and as security therefor, Borrower grants Provident a security inter-

---

3. This is not a case where the court was presented with a record containing conflicting evidence in the form of written documents from which it had to draw factual inferences. Were that the case, Rule 52(a) would require us to review the findings under the "clearly erroneous rule."

> "Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts. . . . The rule does not apply to conclusions of law . . . [nor does it] furnish particular guidance with respect to distinguishing law from fact."

Pullman-Standard v. Swint, 50 U.S.L.W. 4425, 4429 (U.S. April 27, 1982). The issue before us is one of drawing a legal conclusion regarding the consequences of a document. *See generally*, Borden Co. v. Clearfield Cheese Co., 369 F.2d 96 (3d Cir. 1966). The district court cannot, by couching a legal conclusion as a finding of fact, prevent appellate review of legal errors. *Cf.* Scott Paper Co. v. Scott's Liquid Gold, Inc., 589 F.2d 1225 (3d Cir. 1977) (whether trademark acquired secondary meaning outside the paper goods product line); Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975) (whether defendant's chart infringes copyrighted chart as a matter of law); Sears, Roebuck and Co. v. Johnson, 219 F.2d 590 (3d Cir. 1955) (trade name infringement established as a matter of law).

est in the following assets and all cash and non-cash proceeds thereof ("Collateral"):.

1. [ ] The following motor vehicle, complete with all attachments, equipment, accessories and additions:

MAKE SERIAL NO. BODY STYLE MODEL YEAR

2. [x] All household goods of every kind now owned or hereafter acquired within ten days of this date by Borrower, located in or about Borrower's premises set forth above.

3. [x] Real Property (by a Mortgage and Judgment Note of even date):
Address of Real Property: *2121 E. Orleans St, Phila., Pa.*

4. [x] Other Real Property: The Judgment Note of even date, when recovered or recorded constitutes a lien on all real property owned by Borrower in the County where such judgment is recovered or recorded.

5. [x] Proceeds of insurance required or purchased in accordance with Paragraph F below payable to Lender.

AFTER ACQUIRED REAL AND PERSONAL PROPERTY OF BORROWER WILL BE SUBJECT TO THE SECURITY INTEREST SET FORTH HEREIN AND THE COLLATERAL SECURES FUTURE AND OTHER INDEBTEDNESS OF BORROWER TO PROVIDENT.

The issue is the legal import of the bold faced after acquired property clause at the end of the paragraph.[4]

---

4. The Griggses also claim that Paragraph 17-E 5 is inaccurate and confusing because it refers to non-existent insurance. This argument is without merit. Paragraph 17-E 5 indicates that there is a security interest in insurance required or purchased in accordance with Paragraph F. Paragraph F, in turn, indicates that no insurance

The bold faced section is part and parcel of the security disclosure paragraph. It comes immediately at the end of the description of security and specifically indicates that it addresses "the security interest set forth herein," *i.e.*, in Paragraph 17-E. Whatever the bold faced words might mean if standing alone, they form part of the paragraph and must be interpreted in that context.[5]

Reading the bold faced section in the context of the entire Paragraph 17-E, the reference to after-acquired personal property is modified by Paragraph 17-E 2 to mean household goods and only those acquired within ten days of the loan transaction. The reference to after-acquired real property is accurate as to paragraph 17-E 4 since under Pennsylvania law, in the event plaintiffs' Judgment Note is recorded or recovered upon, all the real property then owned by plaintiffs (including those acquired after the loan issues) in the county where the judgment is entered of record, becomes subject to the lien. 42 Pa. Cons. Stat. Ann. §4303 (Purdon 1981). The bold faced section has no application to Paragraph 17-E 3 since that paragraph contains no after-acquired provisions but instead describes a well defined mortgage on a well defined property. The bold faced sub-paragraph

---

NOTE — *(Continued)*

was purchased. Paragraph 17-E 5 alone does not show that there is a security interest in insurance proceeds and we, therefore, find no inaccuracy. Moreover we fail to see any source of confusion or obstruction when upon reading 17-E 5 the borrower refers to Paragraph F and finds it completely blank. It would be apparent to even the most unsophisticated borrower that there is no insurance and hence no security interest.

5. We agree with the Griggses that if the bold faced section in conjunction to paragraph 17-E were to disclose more security interests than what defendant actually had, there would be a violation of the Act and regulations. The purpose of the Act is for customers to be able to make informed decisions. This would be adversely affected as much by overstating a lender's security interests as by understating them.

thus is modified by the substantive provisions preceding it, and a reading of the paragraph as an integral whole indicates no inaccuracies.

The district court also held that, even if accurate, the bold faced section was confusing and misleading, because "there is no reason for the additional confusing information to be present. . . . If the bold print adds nothing to the security interest taken, there is no reason to have it in the form at all." 503 F. Supp. at 250. We disagree. The bold faced section fulfills a useful function. It signals to the potential customer that after-acquired propety will be subject to defendant's security interest and, thereby, insures that the customer focus on the preceding paragraph to understand the full scope of his commitments. The Board regulations specifically require that "[i]f after-acquired property will be subject to the security interest. . ., the fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired." 12 C.F.R. §226.8(b)(5). This requirement of clear disclosure of "after acquired property security interests" justifies Provident's use of a bold face warning flagging a customer's attention to the existence of such security interest.

Thus we hold that the district court erred in determining that defendant violated the Act and Regulation Z in its disclosure of security interests. The district court did not, however, reach plaintiffs' allegations that the defendant improperly calculated the refund due to them of interest prepaid on the original loan. Neither can we, absent district court factfinding. We must therefore remand for a determination of the Griggses' remaining grounds for relief.

III.

Since on remand the question may arise of setting off plaintiffs' pre-bankruptcy obligations to Provident

against their recovery, if any, that question should be addressed.

The Act has important penal characteristics. *See Mourning v. Family Publications Service Inc.*, 411 U.S. 356, 376 (1973); *Riggs v. Government Employees Financial Corp.*, 623 F.2d 68 (9th Cir. 1980); *Newton v. Beneficial Finance Company of New Orleans*, 558 F.2d 731 (5th Cir. 1977). The Senate Report stated:

> The enforcement of the bill would be accomplished largely through the institution of civil actions authorized under section 7 [15 U.S.C. §1640] of the bill. Any creditor who fails to disclose the required information would be subject to a civil action with a penalty of twice the finance charge. . . . The committee has not recommended investigative or enforcement machinery at the Federal level, largely on the assumption that the civil penalty section will secure substantial compliance with the act.

S. Rep. No. 392, 90th Cong., 1st Sess. 9 (1967). The Report indicates a congressional intent to deter improper disclosure practices by a system of civil liability. The Act allows recovery even when the complainant was not deceived by misdisclosure, and provides for statutory damages *in addition* to actual damages. Thus the Act imposes a civil penalty, the purpose of which is to provide an incentive for private litigants to institute actions and thereby enforce the Act's provisions.

A setoff of bankruptcy discharged debts owed a creditor would interfere with the penal purpose of the Act. *Newton v. Beneficial Finance Company of New Orleans, supra*, 558 F.2d at 732; *see also Riggs v. Government Employees Finance Corp., supra*, 623 F.2d at 73-75. If a creditor were allowed a setoff, the deterrent effect of the civil penalty liability would be reduced. A setoff would remove incentives for an obligor to sue under the Act. Moreover, a setoff would be anomalous since the cause of action inures to the plaintiff as a pri-

vate attorney general. Superficially it may appear unfair to Provident to make it pay statutory damages in addition to the losses incurred as a result of the Griggses' bankruptcy. The losses due to bankruptcy, however, are a product of Provident's judgment in making a loan. Bankruptcy is a business risk which any lender takes. Bankruptcy losses are thus independent from the Act and Provident cannot rely on these losses for relief from the Act's penalty provisions. Neither can Provident complain that the Griggses receive a windfall by recovering damages under the Act while having their loan discharged. That windfall is provided by Congress in order to stimulate truth in lending suits. We hold, therefore, that there can be no setoff of the bankruptcy discharged debt against any recovery of statutory damages. *Accord Newton v. Beneficial Finance Company of New Orleans*, 558 F.2d 731 (5th Cir. 1977); *see Riggs v. Government Employees Financial Corp.*, 623 F.2d 68 (9th Cir. 1980). *Cf. McCullom v. Hamilton National Bank*, 303 U.S. 245 (1938) (debt discharged by bankruptcy cannot be used to offset a penalty, imposed by federal statute, against national bank for taking usurious interest.).

IV.

The judgment appealed from will be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2989

GRIGGS, ROBERT C. and GRIGGS, JACQUELINE M.

vs.

PROVIDENT CONSUMER DISCOUNT COMPANY,
Appellant

(D.C. Civil No. 80-01930)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and HUNTER, Circuit Judges and GERRY, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on May 13, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 5, 1981, be, and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

Sally Dimond
Clerk

June 2, 1982

*Honorable John F. Gerry, United States District Judge for the District

Construing the Act's preemption clause to forbid state regulation of exempted air carriers would make the foregoing provisions of Title IV meaningless. More than contemplating the existence of state regulation, they obviously rely upon and adopt it.

A statute's purpose is also a key to its meaning. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980). Nothing in the preemption clause's purpose indicates any intent or necessity for prohibiting state regulation of exempt air carriers. Congress enacted the preemption clause to resolve "uncertainties and conflicts, including situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State." House Report No. 95–1211 at 16, 4 U.S.Code and Admin.News 1978, pp. 3751, 3752 (1979) (footnote omitted). When a carrier is exempt and its rates, therefore, are not regulated by the CAB, state regulation will not cause "uncertainties and conflict."

Expanding the scope of the statutory purpose examined from the purpose of the preemption clause to the purpose of the entire Airline Deregulation Act, there is still no indication that Congress intended for exemption from Civil Aeronautics Board regulation to preempt state regulation of airlines. The entire Airline Deregulation Act of 1978, the House Report No. 95–1211 (4 United States Code and Administrative News, p. 3737 [1979]), and the House Conference Report No. 95–1779 (4 United States Code and Administrative News, p. 3773 [1979]) all indicate Congress' purpose was reducing federal regulation of airlines. Only where state and federal regulation overlap did Congress indicate any purpose to affect state regulation. There is no overlap in state regulation of exempt air carriers.

All logically relevant factors lead to the conclusion that states may regulate air carriers exempted pursuant to Title 49, United States Code, Section 1386(b)(4), from Board regulation. Such exemptions are not grants of authority under subchapter IV, and the preemption clause, therefore, does not affect state regulation. This conclusion is not inconsistent with the decision in *Braniff International, Inc. v. Florida Public Service Commission*, TCA No. 76–4 (March 30, 1979), which declared Section 330.53, Florida Statutes (1979), expressly preempted

> Florida Statutes § 330.53 empowers the Florida Public Service Commission 'to disapprove any change in a rate, fare, or schedule between points in this state of a person engaged in air transportation pursuant to a certificate or certificates issued by the Civil Aeronautics Board pursuant to s. 401 of the Federal Aviation Act of 1958 ....'

Id. at 2; footnote omitted. In contrast Florida's jurisdiction over Charter Air is created in a statute neatly meshing with the preemption clause and carefully excluding from its purview persons operating under certificates of authority from the Board. § 330.46, Fla.Stat. (1979).

The Plaintiff's Motion for Summary Judgment is denied. The Defendant's Motion for Summary Judgment is granted. The Clerk shall assess all lawful costs against the Plaintiff.

Robert C. GRIGGS and Jacqueline M. Griggs

v.

PROVIDENT CONSUMER DISCOUNT COMPANY.

Civ. A. No. 80–1930.

United States District Court, E. D. Pennsylvania.

Dec. 24, 1980.

Husband and wife filed action seeking to recover against creditor for violation of

the Truth in Lending Act. Parties filed cross motions for summary judgment. The District Court, Joseph S. Lord, III, Chief Judge, held that the after-acquired property clause printed in bold face on the disclosure statement in the Truth in Lending Act transaction violated the Act as to both real and personal property where the mortgage the creditors took in connection with the transaction applied only to the plaintiffs' residence, as was specifically set forth in the legitimate security interest taken in real property, but the after-acquired property clause incorrectly disclosed the security interest in all real property acquired in the future and the clause as it related to after-acquired personal property was not limited to such goods the debtor would acquire within ten days after the creditor gave value and therefore violated Pennsylvania law limiting the security interest a creditor could hold in after-acquired consumer goods.

Motion for summary judgment granted.

1. Consumer Credit ⇐50, 51

Truth in Lending Act and regulations promulgated under Act require creditor to disclose relevant credit information to consumer in comprehensible language and form; required disclosures are intended to provide, especially to inexperienced and uninformed consumer, way to avoid possibility of deception, misinformation, or at least obliviousness to true costs of credit transaction. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.; Truth in Lending Regulations, Regulation Z, § 226.1 et seq., 15 U.S.C.A. foll. § 1700.

2. Consumer Credit ⇐56

Creditor in Truth in Lending Act transaction must clearly describe or identify any security interest retained by creditor. Truth in Lending Act, § 129(a)(8) as amended 15 U.S.C.A. § 1639(a)(8); Truth in Lending Regulations, Regulation Z, § 226.8(b)(5), 15 U.S.C.A. foll. § 1700.

3. Consumer Credit ⇐56

After-acquired property clause contained in disclosure statement for Truth in Lending Act transaction violated Truth in Lending Act as to real property in that purported disclosure of security interest in all after-acquired real property was inaccurate when mortgage creditors took in connection with transaction applied only to borrowers' residence. Truth in Lending Act, § 129(2)(8) as amended 15 U.S.C.A. § 1639(a)(8); Truth in Lending Regulations, Regulation Z, § 226.8(b)(5), 15 U.S.C.A. foll. § 1700.

4. Consumer Credit ⇐56

After-acquired property clause contained in financial disclosure statement for Truth in Lending Act transaction was inaccurate as concerned after-acquired personal property where Pennsylvania law limited security interest creditor could hold in after-acquired consumer goods so that creditor could acquire security interest in such goods only where debtor acquired rights in goods within ten days after creditor gave value, but bold print after-acquired property clause failed to confine interest to personal property acquired within ten days. Truth in Lending Act, § 129(a)(8) as amended 15 U.S.C.A. § 1639(a)(8); Truth in Lending Regulations, Regulation Z, § 226.8(b)(5), 15 U.S.C.A. foll. § 1700; 13 Pa.C.S.A. § 9204 (d)(2).

5. Consumer Credit ⇐51

Misleading and confusing disclosures as well as failures to disclose constitute violations of Truth in Lending Act and Regulation Z. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.; Truth in Lending Regulations, Regulation Z, § 226.1 et seq., 15 U.S.C.A. foll. § 1700.

6. Consumer Credit ⇐56

Even if general after-acquired property provision in Truth in Lending Act transaction merely related back to specific provisions of paragraph in disclosure statement, general after-acquired property provision violated Truth in Lending Act where there was no reason for additional confusing in-

formation to be present, no satisfactory reason was offered to explain why bold print clause was included on disclosure statement and confusion would have been lessened if bold print clause had been omitted from form altogether. Truth in Lending Act, § 129(a)(8) as amended 15 U.S.C.A. § 1639(a)(8); Truth in Lending Regulations, Regulation Z, § 226.8(b)(5), 15 U.S.C.A. foll. § 1700.

7. Consumer Credit ⇐50

Requirements of Truth in Lending Act are highly technical, but full compliance is required; even minor violations of Act cannot be ignored. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.; Truth in Lending Regulations, Regulation Z, § 226.1 et seq., 15 U.S.C.A. foll. § 1700.

8. Consumer Credit ⇐64
Federal Civil Procedure ⇐2515

Question of whether lender's Truth in Lending Act disclosures are inaccurate, misleading or confusing ordinarily will be for fact finder; however, where confusing, misleading and inaccurate character of disputed disclosure is so clear that it cannot reasonably be disputed, summary judgment for plaintiff is appropriate. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.; Truth in Lending Regulations, Regulation Z, § 226.1 et seq., 15 U.S.C.A. foll. § 1700.

9. Consumer Credit ⇐67

Where husband and wife were co-obligors in Truth in Lending Act transaction, language of Act provides for separate recovery by each consumer involved in transaction and, therefore, each one could recover twice amount of finance charge up to maximum of $1,000, as Act does not limit consumers to one recovery per transaction. Truth in Lending Act, § 130(a) as amended 15 U.S.C.A. § 1640(a).

1. The Truth in Lending Act is the short title of Title I of the Consumer Protection Act, 15 U.S.C. §§ 1601 *et seq.*

Henry J. Sommer, Community Legal Services, Inc., Philadelphia, Pa., for plaintiffs.

Sheldon C. Jelin, Philadelphia, Pa., for defendant.

MEMORANDUM

JOSEPH S. LORD, III, Chief Judge.

Plaintiffs and defendant have filed cross-motions for summary judgment in this Truth in Lending Act[1] (TILA) case. On June 19, 1979, the plaintiffs and defendant signed a Note, Security Agreement and Disclosure Statement (Disclosure Statement) refinancing an earlier loan made to plaintiffs by defendant. Attachment to Defendant's Answer.

Plaintiffs argue that defendant violated the TILA in three ways. First, they argue that the description of the security interest taken in after-acquired property is inaccurate and misleading. Second, plaintiffs claim that defendant improperly calculated the refund due to plaintiffs of interest prepaid on the original loan resulting in an incomplete refund. Plaintiffs claim that the amount not refunded to them should have been and was not disclosed as part of the finance charge on the June 19th transaction. As a result of this allegedly incorrect calculation, the disclosures of the amount financed and the annual percentage rate are also claimed to be incorrect. Third, plaintiffs argue that the disclosure of a security interest in proceeds of insurance where no insurance exists violates the TILA. I need find only a single violation of the statutory requirements to hold defendant liable under the TILA. 15 U.S.C. § 1640; *Thomka v. A. Z. Chevrolet, Inc.*, 619 F.2d 246 (3d Cir. 1980). I agree with plaintiffs that the after-acquired property clause violates the TILA and therefore will not resolve the other claims.

[1] Congress declared that its purpose in enacting the TILA was to promote "the informed use of credit ... by consumers"

and "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him ...." 15 U.S.C. § 1601. *See also Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). The TILA and the regulations[2] promulgated under it require a creditor to disclose relevant credit information to a consumer in comprehensible language and form. The required disclosures are intended to provide, especially to the inexperienced and uninformed consumer, a way to avoid "the possibility of deception, misinformation, or at least an obliviousness to the true costs" of a credit transaction. *Thomka*, 619 F.2d at 248. *See also Allen v. Beneficial Finance Co.*, 531 F.2d 797 (7th Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976).

[2] A creditor in a TILA transaction must clearly describe or identify any security interest retained by the creditor. 15 U.S.C. at § 1639(a)(8); 12 C.F.R. at § 226.8(b)(5). Defendant disclosed the security interest at issue here by checking boxes next to the following items in Paragraph E of the printed Disclosure Statement:

> 2. All household goods of every kind now owned or hereafter acquired within ten days of this date by Borrower, located in or about Borrower's premises set forth above.
>
> 3. Real Property (by a Mortgage and Judgment Note of even date): Address of Real Property: 2121 E. Orleans St. Phila., Pa. [address handwritten in].
>
> 4. Other Real Property: The Judgment Note of even date, when recovered or recorded constitutes a lien on all real property owned by Borrower in the County where such judgment is recovered or recorded.
>
> 5. Proceeds of insurance required or purchased in accordance with Paragraph F below payable to Lender.

Note, Security Agreement, and Disclosure Statement, Attachment to Answer. Immediately following the above provision, in larger type, the form states, "AFTER ACQUIRED REAL AND PERSONAL PROPERTY OF BORROWER WILL BE SUBJECT TO THE SECURITY INTEREST SET FORTH HEREIN AND THE COLLATERAL SECURES FUTURE AND OTHER INDEBTEDNESS OF BORROWER TO PROVIDENT."

[3] The after-acquired property clause violates the TILA as to both real and personal property. First, the purported disclosure of a security interest in after-acquired real property is clearly inaccurate. Both defendant and plaintiffs agree that the mortgage defendants took in conjunction with this transaction applied only to the plaintiffs' residence at 2121 E. Orleans Street. Paragraph E.3. explicitly sets forth the legitimate security interest taken in real property. However, the after-acquired property clause contradicts Paragraph E.3. and incorrectly discloses a security interest in all real property acquired in the future by plaintiffs. An incorrect disclosure of a security interest violates the TILA and Regulation Z. 15 U.S.C. at § 1639(a)(8); 12 C.F.R. at § 226.8(b)(5).

[4] The inaccuracy of the after-acquired property clause as to real property alone is enough to subject defendant to liability under the TILA. However, this inaccuracy is coupled with a confusing and misleading disclosure as to after-acquired personal property. Pennsylvania law limits the security interest a creditor can hold in after-acquired consumer goods. Under 13 Pa. Cons.Stat. § 9204(d)(2) a creditor can acquire a security interest in such goods only where the debtor acquires rights in the goods within ten days after the creditor gives value. Paragraph E–2 is within the limits of Pennsylvania law. However, the bold print clause appears to grant a much broader security interest since it fails to confine the interest to property acquired within ten days.

[5] Plaintiffs argue, and I agree, that these contradictory provisions are confusing and misleading in violation of the TILA and

2. The TILA regulations, 12 C.F.R. § 226 (1979), are referred to as a group as Regulation Z.

and "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him ...." 15 U.S.C. § 1601. *See also Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). The TILA and the regulations[2] promulgated under it require a creditor to disclose relevant credit information to a consumer in comprehensible language and form. The required disclosures are intended to provide, especially to the inexperienced and uninformed consumer, a way to avoid "the possibility of deception, misinformation, or at least an obliviousness to the true costs" of a credit transaction. *Thomka*, 619 F.2d at 248. *See also Allen v. Beneficial Finance Co.*, 531 F.2d 797 (7th Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976).

[2] A creditor in a TILA transaction must clearly describe or identify any security interest retained by the creditor. 15 U.S.C. at § 1639(a)(8); 12 C.F.R. at § 226.8(b)(5). Defendant disclosed the security interest at issue here by checking boxes next to the following items in Paragraph E of the printed Disclosure Statement:

> 2. All household goods of every kind now owned or hereafter acquired within ten days of this date by Borrower, located in or about Borrower's premises set forth above.
>
> 3. Real Property (by a Mortgage and Judgment Note of even date): Address of Real Property: 2121 E. Orleans St. Phila., Pa. [address handwritten in].
>
> 4. Other Real Property: The Judgment Note of even date, when recovered or recorded constitutes a lien on all real property owned by Borrower in the County where such judgment is recovered or recorded.
>
> 5. Proceeds of insurance required or purchased in accordance with Paragraph F below payable to Lender.

Note, Security Agreement, and Disclosure Statement, Attachment to Answer. Immediately following the above provision, in larger type, the form states, "AFTER ACQUIRED REAL AND PERSONAL PROPERTY OF BORROWER WILL BE SUBJECT TO THE SECURITY INTEREST SET FORTH HEREIN AND THE COLLATERAL SECURES FUTURE AND OTHER INDEBTEDNESS OF BORROWER TO PROVIDENT."

[3] The after-acquired property clause violates the TILA as to both real and personal property. First, the purported disclosure of a security interest in after-acquired real property is clearly inaccurate. Both defendant and plaintiffs agree that the mortgage defendants took in conjunction with this transaction applied only to the plaintiffs' residence at 2121 E. Orleans Street. Paragraph E.3. explicitly sets forth the legitimate security interest taken in real property. However, the after-acquired property clause contradicts Paragraph E.3. and incorrectly discloses a security interest in all real property acquired in the future by plaintiffs. An incorrect disclosure of a security interest violates the TILA and Regulation Z. 15 U.S.C. at § 1639(a)(8); 12 C.F.R. at § 226.8(b)(5).

[4] The inaccuracy of the after-acquired property clause as to real property alone is enough to subject defendant to liability under the TILA. However, this inaccuracy is coupled with a confusing and misleading disclosure as to after-acquired personal property. Pennsylvania law limits the security interest a creditor can hold in after-acquired consumer goods. Under 13 Pa. Cons.Stat. § 9204(d)(2) a creditor can acquire a security interest in such goods only where the debtor acquires rights in the goods within ten days after the creditor gives value. Paragraph E–2 is within the limits of Pennsylvania law. However, the bold print clause appears to grant a much broader security interest since it fails to confine the interest to property acquired within ten days.

[5] Plaintiffs argue, and I agree, that these contradictory provisions are confusing and misleading in violation of the TILA and

2. The TILA regulations, 12 C.F.R. § 226 (1979), are referred to as a group as Regulation Z.

Regulation Z. Misleading and confusing disclosures as well as failures to disclose constitute violations. *Gennuso v. Commercial Bank & Trust Co.*, 566 F.2d 437 (3d Cir. 1977). Regulation Z specifically prohibits creditors from including on disclosure statements information other than that required by the TILA where that information is "stated, utilized, or placed so as to mislead or confuse the customer ... or [to] contradict, obscure, or detract attention from the [required] information ...." 12 C.F.R. at § 226.6(c).

Defendant notes that the Tenth Circuit has held that it is not a violation for a creditor to disclose a security interest in after-acquired property without further disclosing state limitations on such security interests including time limits on acquisition. *Montoya v. Postal Credit Union*, 630 F.2d 745 (10th Cir. 1980). In this case, however, there are two technically accurate disclosures on after-acquired personal property. The violation is that the disclosures are apparently contradictory and thus, I hold, are misleading and confusing under the TILA.

[6] Defendant argues that the general after-acquired property provision in the bold print simply refers back to the specifics of Paragraph E, and thus is not contradictory. Even if we accept defendant's argument, there is no reason for the additional confusing information to be present. Defendant advances no satisfactory reason to explain why the bold print clause was included on the disclosure statement. If the bold print adds nothing to the security interest taken, there is no reason to have it in the form at all. Confusion certainly would have been lessened if the bold print clause had been omitted from the form altogether. *See Gennuso, supra; Ives v. W. T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975); *Barber v. Kimbrell's, Inc.*, 424 F.Supp. 42 (W.D.N.C. 1976), *aff'd in part, rev'd in part*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978).

[7] "Enforcement [of the TILA] is achieved in part by a system of strict liability in favor of consumers who have secured financing when [the required statutory] standard is not met." *Thomka*, 619 F.2d at 248. The requirements of the TILA are highly technical but full compliance is required.[3] *Gennuso, supra.* Even minor violations of the Act can not be ignored. *Thomka, supra.*

[8] The question of whether a lender's TILA disclosures are inaccurate, misleading, or confusing ordinarily will be for the factfinder. However, where, as here, the confusing, misleading, and inaccurate character of the disputed disclosure is so clear that it cannot reasonably be disputed, summary judgment for the plaintiff is appropriate. *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978). *See also Gennuso, supra* (summary judgment for plaintiff on question of whether disclosure of security interest in nonexistent item is misleading); *Allen, supra* (summary judgment for plaintiff on issue of defendant's failure to make TILA disclosures in "meaningful sequence"); *Weaver v. General Finance Corp.*, 528 F.2d 589, 590 (5th Cir. 1976) (summary judgment for plaintiff where court finds defendant's disclosure "had the capacity to mislead or confuse a potential borrower ....").

Both parties have moved for summary judgment. I find there is no genuine issue of material fact as to the inaccuracy of the after-acquired property clause as applied to real property. There is also no genuine issue as to the capacity of that clause to confuse and mislead potential borrowers. Therefore I will grant the plaintiffs' motion for summary judgment.

3. Congress has addressed itself to complaints about the technicality of the TILA by amending it in the Truth in Lending Simplification and Reform Act, P.L. 26-221, 48 U.S.L.W. 124 (Apr. 22, 1980). The amendment, effective in 1982, limits liability for statutory penalties to disclosures of central importance in understanding the transaction. Inaccurate disclosure of any security interest taken remains a basis for liability however. *Id.* at 128; S.Rep., [1980] U.S. Code Cong. & Ad.News pp. 878, 892-94.

[9] The TILA provides that the consumer may recover twice the amount of the finance charge up to a maximum of $1,000. 15 U.S.C. at § 1640(a). The statutory limit applies in this case since the finance charge was $713.25. Plaintiffs are husband and wife, co-obligors on the transaction. Each seeks recovery of the statutory damages of $1,000. Defendant argues that the TILA limits consumers to one recovery per transaction. The language of § 1640(a) states that a creditor who violates the act "with respect to *any* person is liable to *such* person" in the amount provided (emphasis added). I agree with the analysis in *Cadmus v. Commercial Credit Plan, Inc.*, 437 F.Supp. 1018 (D.Del.1977) that the language of the TILA provides for separate recovery by each consumer involved in the transaction. *See also Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976); *Allen, supra.*

The TILA also provides for a reasonable attorney fee for prevailing plaintiffs. 15 U.S.C. at § 1640(a)(3). Plaintiffs have requested an attorney's fee in this case. A petition for a fee under § 1640(a)(3) will be entertained.

Naomi D. THOMPSON, Plaintiff,

v.

VILLAGE OF EVERGREEN PARK, ILLINOIS et al., Defendants.

No. 80 C 2506.

United States District Court, N. D. Illinois, E. D.

Dec. 24, 1980.

On a motion by defendant village to dismiss a complaint charging an unconstitutional "strip search," the District Court, Shadur, J., held that: (1) allegations of complaint that village in its capacity as governing and rule-making body implemented policy of routine strip searches through adoption of formal policy or pursuant to governmental custom, which policy or custom was acted upon, executed and enforced by its various agencies and agents was sufficient pleading of responsibility of municipal corporation for actions complained of, and (2) under Illinois law, municipality was not liable for punitive damages for malicious prosecution.

Motion denied and village ordered to answer.

1. Civil Rights ⇐13.12(3)

Allegations of complaint that village in its capacity as governing and rule-making body implemented policy of routine strip searches through adoption of formal policy or pursuant to governmental custom, which policy or custom was acted upon, executed and enforced by its various agencies and agents was, in suit for alleged unconstitutional "strip search," sufficient pleading of responsibility of municipal corporation for actions complained of. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc. Rules 8(a), 9(b, g), 28 U.S.C.A.

2. Civil Rights ⇐13.17

Statute provides for attorney fees for prevailing defendants in appropriate civil rights cases, though test is a stringent one, and court also has inherent power to deal with abuses if truly frivolous claims are presented. 42 U.S.C.A. § 1988.

3. Municipal Corporations ⇐743

Under Illinois law, municipality was not liable for punitive damages for malicious prosecution. S.H.A.Ill. ch. 85, § 2–102.

Sandra M. Weil, Lieberman, Levy, Stone & Schlossberg, LTD., Chicago, Ill., for plaintiff.

Alfred C. Tisdahl, Jr., French & Rogers, Chicago, Ill., for defendants.

OFFICE OF THE CLERK

SALLY MRVOS
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

TELEPHONE
215-597-2995

Sheldon C. Jelin, Esq.
James W. Tracey, III, Esq.
WOLLMAN AND TRACEY
1518 Lewis Tower Bldg.
Philadelphia, PA 19102

December 4, 1981

Re: GRIGGS, ROBERT C. and GRIGGS, Jacqueline M.
vs.
PROVIDENT CONSUMER DISCOUNT COMPANY,
Appellant.

(D. C. Civil No. 80-01930)

No. 81-2989

Gentlemen:

The above-entitled case was docketed in this Court at No. 81-2989 and the record on appeal filed today.

In light of this court's order dated October 2, 1981, entered in No. 81-1230, please advise this office in writing if it is your intention to rely on the briefs previously filed at No. 81-1230.

If this is not your intention, the Statement of the Contents of the Appendix and Statement of Issues presented are to be furnished to the appellee within ten (10) days from this date (see Rule 30(b) of the Federal Rules of Appellate Procedure); the brief for appellant and the appendix are to be filed and served within forty (40) days from this date (see Rules 30(a) and 31 of F.R.A.P.)

Very truly yours,

SALLY MRVOS, CLERK

By Kathleen Grady
Kathleen Grady, Deputy Clerk

jj
cc: Henry J. Sommer, Esq.
Community Legal Services, Inc.
3156 Kensington Ave.
Philadelphia, PA 19134

Michael E. Kunz, Clerk
Philadelphia, PA

NOTICE TO COUNSEL: YOUR ATTENTION IS DIRECTED TO RULE 4(a)(4) F.R.A.P. IN REGARD TO THIS APPEAL.

IMPORTANT: ALL COUNSEL MUST COMPLY WITH RULE 25 BY PROVIDING THIS OFFICE WITH DISCLOSURE STATEMENT WITHIN ONE WEEK OF THE DATE OF THIS LETTER.

APPENDIX C